Draft Sediment Management Standards Chapter 173-204 WAC Amendments
Public Comment Form

Name of Commenter:	Clay Patmont, David Templeton, and Mark Larsen (Anchor QEA. LLC)
Version of Document Reviewed:	___ Review Version (Reader Friendly) **X** Official Version
Date:	October 29, 2012

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General Comment	N/A	We have been following the development of the SMS rule revisions for several years, and while the proposed amendments contain a number of improvements over the current rule language, other elements of the proposed revisions have the potential to exacerbate, rather than alleviate, some of the practical challenges posed by the current rules.
General Comment	N/A	The current draft of the SMS rule demonstrates that Ecology is trying to address many of the technical and policy issues and comments received previously in ways that meet the over-riding goal of making the SMS protective and implementable, including: • A multi-phase approach for sediment recovery over a long timeframe and broad geographic areas; • A regional background approach to allow incorporation of technical feasibility, cost considerations, and net environmental benefits in cleanup decisions; • Provisions for discrete sediment cleanup units and/or sites within larger bay-wide areas of sediment impact; • Consideration of practical incentives to encourage potentially liable parties (PLPs) to take action regarding problems they can control and potential cash-out settlements for larger bay-wide problems; and • Strategic analysis of how the SMS update will be interpreted and implemented by different federal, state and local environmental regulatory programs (e.g., Water Quality Program, NPDES industrial and municipal permits, MTCA, CERCLA, etc.).
General Comment	NA	Ecology undertook a great deal of outreach and involvement with knowledgeable professionals and other stakeholders leading up to the proposed SMS amendments, including several advisory committees. From our perspective, it appeared that both Ecology and the committee members put a great deal of time and energy into reaching workable solutions to problems that have posed a genuine impediment to moving forward with sediment cleanups. Based on sample rule language distributed in October 2011 and other materials Ecology presented at the last meeting held with advisory committee members in December 2011, the agency appeared to have charted a course for focused rule amendments that would create a workable path through some very thorny MTCA/SMS issues and help in expediting needed sediment cleanups. However, while the proposed rule amendments include some aspects of the pragmatic approach that resulted from the advisory committee process, other portions of the amendments represent very significant changes to the current rule that we understand were either never discussed, or were discussed and quickly put aside by the advisory committee as unworkable. The changes needed to align these rule amendments with a more practicable approach are fundamental enough that new draft language needs to be proposed.
17	65 – 69	The new requirement to establish sediment recovery zones at sites and cleanup units where cleanup levels cannot be met within ten years of the start of the cleanup is highly problematic. We understand that the final advisory committee made clear to Ecology that including the sediment recovery zone standards of WAC 173-204-590 in the new SMS rule revisions would stymie cleanup, as this element of the existing SMS regulations has proved totally unworkable in the real world because of "technical impracticability" and other similarly difficult criteria that need to be achieved to use this element of the SMS rule. Given that the highly conservative background or practical quantitation limit (PQL)-based sediment cleanup levels for bioaccumulative chemicals such as PCBs, dioxins/furans, and PAHs are anticipated to be exceeded at nearly every sediment cleanup site in part because of uncontrollable, diffuse non-point source inputs of these regional contaminants, the entirety of subsection (4) discussing sediment recovery zones needs to be deleted.
26	223 - 227	The proposed language of WAC 173-204-200(1) is problematic because it, combined with the provisions of WAC 173-204-570(3)(h), establishes "active" cleanup as the presumptive remedy at all sites. Please see our comment on the revised language of WAC 173-204-570(3)(h) below. The inadvisable presumptive approach to require "active cleanup" will only further stymie cleanup progress. Thus, the entirety of WAC 173-204-200(1) needs to be deleted. Similar edits need to be made to related parts of the SMS rule.

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29	283 - 285	The definition of "contaminant" needs to be expanded to explicitly recognize that the bioavailability of sediment contaminants may vary significantly both within and between sites based on site-specific geochemistry and other factors. Sub-section (15) and other related sections and sub-sections need to be re-written to clarify that site-specific bioavailability considerations should be incorporated into the development of site-specific cleanup levels using approaches developed by the Interstate Technology & Regulatory Council (ITRC) and discussed in other relevant Agency guidance documents. Note that the ITRC's February 2011 Technical/Regulatory Guidance (which Ecology helped co-author): "*Incorporating Bioavailability Considerations into the Evaluation of Contaminated Sediment Sites*" states: "*Overall, this guidance establishes that bioavailability considerations should be incorporated in the exposure assessment process to obtain a clearer understanding of contaminant toxicity and exposure pathways such that remedy selection decisions can be focused and resources efficiently used. By incorporating bioavailability considerations into the early stages of site characterization, the risk assessment process, and remedy selection, a more effective remediation may be accomplished, which may well optimize overall cost. This web-based technical and regulatory guidance can help the user understand the proper application of these tools to assess bioavailability and more effectively protect human health and the environment*."
34	389 - 393	While the general definition of "regional background" in sub-section (38) is workable with revisions (see below), the utility of this approach will be entirely dependent on how regional background is ultimately calculated, which presumably will be described in detail in the Sediment Cleanup User Manual. We understand that Ecology is developing a pilot study to examine this issue in greater detail, but we have significant concerns that the regional background calculation approaches that Ecology is currently considering are impracticable, as they do not allow sufficient differentiation between existing or prospective SMS site units and bay-wide contamination problems. This creates gridlock in the processing of the current backlog of sediment sites. Regional background should include contaminants contributed to the region from multiple urban stormwater sources, in order to distinguish those pollution problems from more discrete sediment sites that can be linked to a more specific, and likely historic, past practice. For example, detailed national and regional studies of dioxin sources have concluded that: 1) currently, the largest quantified source of dioxin emissions throughout the U.S. is the uncontrolled burning of household trash (backyard burning; http://www.epa.gov/wastes/nonhaz/municipal/backyard/health.htm); and 2) common non-point source inputs such as those resulting from historical roadside weed control have been identified as important sources of dioxin to regional sediments. The similarity of both soil and sediment dioxin concentrations and congener profiles in urbanized areas of Puget Sound to those found throughout the region provides further evidence that existing sediment dioxin concentrations are the product of a wide range of historical point and non-point source legacy releases, as well as ongoing non-point source inputs. Regional background problems should be addressed under the appropriate regulatory tool (e.g., Phase II municipal permits) and not site-specific MTCA/SMS enforcement. Calculation of regional background should allow for inclusion of certain contaminants if they are due to the influence of multiple urban sources. The concept of regional background should be specifically used to determine discrete SMS sites or site units.
36	435 - 442	The proposed revisions significantly and unrealistically shorten the maximum restoration timeframe for a cleanup. Informed by the committee members' collective experience with how long many cleanup projects take to implement, we understand that the final advisory committee considered and rejected the option of changing the rules from the current requirement that cleanup standards must be met with 10 years following completion of cleanup, to requiring that cleanup standard must be met within 10 years of *initiating* cleanup. However, the August 2012 proposal ignores the committee's recommendation. Thus, the next to last sentence of sub-section (46) needs to be revised to read: "*within ten years after the ~~start~~completion of the cleanup ~~action~~construction.*" The

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		last sentence of this sub-section referring to sediment recovery zones needs to be deleted, consistent with the comment above regarding page 17.
xcv	1500 - 1507	Given the complexities of permitting and coordinating beneficial reuse opportunities at sediment cleanup sites it is unrealistic for Ecology to expect that sediment cleanup construction within sediment cleanup units (let alone entire sites) can be completed within a single construction season. This sub-section needs to be re-written to more simply state that: "*restoration will be completed as soon as practicable, consistent with the general requirements of WAC 173-204-570*."
xcvi	1508 - 1511	Similar to the comment on page 36 above, the entirety of this sub-section either needs to be deleted or the text of sub-section (d) revised to read: "….*within ten years after the ~~start~~completion of the cleanup ~~action~~construction, ...*".
cxxxi	2190-2203	Ecology's October 2011 sample rule language specified that, in determining where to set cleanup levels between the sediment cleanup objective ("SCO") and regional background, three factors should be considered: technical feasibility, cost and net environmental benefit. The document distributed in late 2011 to the final advisory committee titled "*Framework for Sediment Cleanup Decisions*" stated at p. 7 "*The current SMS framework allows consideration of cost, technical feasibility and net environmental effects both when setting cleanup standards in a range between the upper and lower bounds and during remedy selection. This has been successful because the system provides needed flexibility…In the revised rule, this paradigm will remain.*" Yet, despite this, the cost criterion has been dropped in the proposed amendments. This change is difficult to understand given that, by Ecology's own admission, the current rule's consideration of cost in setting cleanup standards is one of the parts of the rule that works well because of the flexibility it provides. Furthermore, the inclusion by reference in the proposed rule of WAC 173-340-360's disproportionate cost analysis ("DCA")in selecting cleanup actions does not take the place of cost consideration in setting cleanup standards, because the threshold requirement that cleanup standards must be attained within a reasonable restoration timeframe dictates which potential cleanup actions can be considered in the DCA. In order to preserve the flexibility that Ecology admits is afforded by the current rule, cost should be restored as a criteria for setting site specific cleanup levels under WAC 173-204-560.
clxxv	2906 - 2910	The August 2012 proposal appears to have ignored the Committee's advice and includes the requirement in WAC 173-204-570(3)(h) that "*Cleanup actions shall not rely primarily on monitored natural recovery or institutional controls and monitoring where it is technically possible to implement a more permanent cleanup action*." The proposed language is problematic because it establishes "active" cleanup as the presumptive remedy at all sites, despite years of collective experience demonstrating that the unique challenges posed by sediment sites often make "active" remedies impracticable. This opinion is not confined to Washington; EPA's current sediment guidance states there is no presumptive remedy for sediment contamination. Consistent with this widely held position, we understand that the final advisory committee that addressed this issue held the consensus view that there is no presumptive sediment remedy, including a requirement for "active" cleanup, for any contaminated sediment site, regardless of the contaminant or the level of risk. Given the widely differing sediment cleanup situations in Washington State, the sediment cleanup remedy should always be the product of careful site-specific evaluations. With lower and lower cleanup levels for constituents like dioxins and PCBs, leading to very large sites, exchanging the site-specific evaluation for a presumptive remedy can and will lead to impracticably broad mandates for active cleanup – for instance, under the proposed rule language, for a 1,000 acre site an active remedy may have to be implemented on more than 500 acres, regardless of how great or small the exceedances of cleanup levels might be. Because the proposed language is both ignores real-world nature of sediment cleanups and partially discards the MTCA process by mandating an active cleanup in advance of compiling and evaluating all available options and data, we believe this portion of the proposed amendments is fatally flawed. The inadvisable presumptive approach to require "active cleanup" will only further stymie cleanup progress. Thus, the entirety of WAC 173-204-200(1) needs to be deleted. Similar edits need to be made to related parts of the SMS rule.
clxxviii	2957 - 2962	Refer to comments regarding pages 17 and 36. The entirety of sub-section (b) needs to be deleted.

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clxxxi to clxxxvii	3007 to 3136	Refer to comment regarding page 17. The entirety of WAC 173-204-590 Sediment recovery zones needs to be deleted.